

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

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JUL 15 1996

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )

Amendment of the Commission's Regulatory )  
Policies to Allow Non-U.S.-Licensed Space )  
Stations to Provide Domestic and International )  
Satellite Service in the United States )

IB Docket No. 96-111

and )

Amendment of Section 25.131 of the )  
Commission's Rules and Regulations to )  
Eliminate the Licensing Requirement for )  
Certain International Receive-Only Earth )  
Stations )

CC Docket No. 93-23  
RM-7931

and )

COMMUNICATIONS SATELLITE )  
CORPORATION )  
Request for Waiver of Section 25.131(j)(1) )  
of the Commission's Rules As It Applies to )  
Services Provided via the Intelsat K Satellite )

File No. ISP-92-007

COMMENTS OF TMI COMMUNICATIONS AND COMPANY,  
LIMITED PARTNERSHIP

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## SUMMARY

TMI Communications and Company, Limited Partnership (TMI) is the designated domestic Mobile Satellite Services (MSS) operator in Canada. Its MSAT-1 satellite, which began Canadian service in June 1996, was planned, financed and constructed in close cooperation with the domestic MSS operator in the United States, AMSC Subsidiary Corporation (AMSC). The AMSC and TMI satellites have a similar North American service footprint and both can be accessed by the same standardized user terminals.

In view of the foregoing, TMI submits that the AMSC and TMI systems jointly constitute a distinct MSS market segment and should not be governed by the global MSS market access test for non-U.S. satellites proposed by the FCC. For these regional MSS systems, a simplified test will preserve the FCC's goals of promoting greater access to non-U.S. satellites while encouraging foreign governments to open their markets to U.S. satellite operators. Specifically, TMI proposes that U.S. earth stations should be permitted to communicate with TMI's satellite provided that Canadian earth stations are permitted to access AMSC's satellite for like services. Adoption of this simplified effective competitive opportunities test should bring immediate benefits to hundreds of thousands of potential mobile satellite users and stimulate MSS service throughout North America, thus assisting current as well as prospective MSS operators.

TMI also proposes that receive-only mobile earth terminals (ROMETs) operating with MSS systems be deregulated. Licensing of these passive terminals is not necessary to preserve the FCC's competition goals or for spectrum coordination purposes. Regulatory forbearance also is required under Section 401 of the Telecommunications Act of 1996.

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**COMMENTS OF TMI**

These comments are filed on behalf of TMI Communications and Company, Limited Partnership (TMI), in response to the Commission's Notice of Proposed Rule Making, IB Docket No. 96-111 et al., FCC 96-210, released May 14, 1996 (hereafter DISCO II Notice).

## I. Introduction

TMI is the designated domestic Mobile Satellite Services (MSS) operator in Canada providing service over the MSAT-1 satellite which was launched into geostationary orbit at 106.5 West Longitude (W.L.) in April, 1996. The MSAT-1 system was planned, financed and constructed in close cooperation with the current domestic MSS operator in the United States, AMSC Subsidiary Corporation (AMSC). The AMSC satellite (AMSC-1, at 101° W.L.) has a similar North American service footprint to MSAT-1 and both satellites can be accessed by the same standardized user terminals or communicators. The parallel development of the TMI and AMSC systems -- including international spectrum coordination, service back-up and capacity sharing agreements -- has been repeatedly endorsed by the Commission and already has produced substantial benefits for mobile service customers in the U.S. as well as in Canada.

TMI is concerned that the market-entry test proposed here for non-U.S. satellites does not reflect the unique history of the AMSC and TMI satellites, which have been twinned almost from conception, or the important differences between these regional MSS systems and the global MSS networks now under development. For various technical and economic reasons, the AMSC and TMI systems jointly constitute a distinct MSS market segment. TMI's provision of service in the U.S. consequently should not depend on the future market access of U.S. licensed global MSS systems which have not been launched and have yet to coordinate their spectrum internationally.

To ensure that customers in the U.S. and Canada are able to receive the full benefits of the TMI and AMSC satellites as early as possible, TMI therefore proposes that the FCC adopt a simplified effective competitive opportunities for satellites (ECO-Sat) test: Under this test, U.S. earth stations should be permitted to communicate with TMI's satellite provided that Canadian

earth stations are permitted to communicate with AMSC's satellite for like services.

**II. The FCC's Generic ECO-Sat Test For Global MSS Should Be Modified For The TMI And AMSC Regional Systems So As To Foster Greater Consumer Choice And Meet Other Public Interest Goals**

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The FCC's proposed market entry policy for MSS systems is designed primarily to foster a competitive market for the next generation of global mobile satellites by barring foreign systems access to the U.S. market until U.S. licensed systems have effective competitive opportunities abroad. The market access standard fashioned by the FCC to achieve these goals is much more far reaching and complex than is required to ensure that a competitive market exists for North America's two existing MSS systems, one licensed in the U.S. and one licensed in Canada. For these two systems, TMI submits, a simplified market access test will achieve the Commission's stated goals of fostering "greater access to non-U.S. satellites"<sup>1</sup> while at the same time "encourag[ing] foreign governments to open their satellite communication markets"<sup>2</sup> to U.S. operators.<sup>3</sup> To understand why this is so, a brief review of the current ECO-Sat standard is helpful.

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<sup>1</sup> DISCO II Notice, *supra* at ¶ 1.

<sup>2</sup> *Ibid.*

<sup>3</sup> Significantly, the FCC acknowledges that although the market access test proposed in the DISCO II Notice "has been crafted so that it can be applied to all satellite services we currently license," the agency's "basic approach may not be adaptable to all satellite services now or in the future." *Id.* at ¶s 44-45.

A. The Proposed ECO-Sat Test And Its Application To  
Mobile Satellite Services (MSS)

The market access test advanced in the DISCO II Notice is intended to provide “a uniform framework for evaluating applications in the United States for authority to access satellites licensed by other countries.”<sup>4</sup> Under this framework, foreign satellite systems will not be required to obtain redundant U.S. space station licenses. Rather, access to the U.S. market will be regulated by licensing American “earth stations to operate with non-U.S. satellite systems for any service that falls within the scope of effective competitive opportunities for U.S. satellites abroad.”<sup>5</sup>

According to the Commission, this “effective competitive opportunities for satellites” or “ECO-Sat” test is similar to the “effective competitive opportunities” or “ECO” standard adopted in the Foreign Carrier Entry Order,<sup>6</sup> “but has been modified to address the unique characteristics of satellite services.”<sup>7</sup> As modified, when a U.S. earth station seeks authority to access a non-U.S. satellite, the ECO-Sat test will focus on whether there are “effective competition opportunities for U.S. satellites in (1) the ‘home market’ of [the] non-U.S. satellite; and (2) some or all of the ‘route markets’ that the non-U.S. satellite seeks to serve from earth stations in the U.S.”<sup>8</sup>

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<sup>4</sup> DISCO II Notice, *supra* at ¶ 1.

<sup>5</sup> *Id.* at ¶ 2.

<sup>6</sup> Report and Order, 11 FCC Rcd 3873 (1995).

<sup>7</sup> DISCO II Notice, *supra* at ¶ 2.

<sup>8</sup> *Id.* at ¶ 18.

The Commission tentatively defines “home market” as the ITU coordinating administration for the non-U.S. satellite.<sup>9</sup> “Route markets” are those foreign markets which a non-U.S. satellite proposes to serve via a U.S. earth station.<sup>10</sup> With respect to each of these “home” and “route” markets, the FCC would determine whether de jure or de facto barriers exist to effective competition by U.S. satellite systems before the foreign satellite is permitted to enter the U.S. market.

This ECO-Sat review would be carried out on a “service-by-service approach” under which the Commission proposes to divide the satellite market into three categories: Fixed Satellite Service (FSS), MSS and Direct-to-Home satellite service (DTH).<sup>11</sup> A U.S. earth station seeking access to a given foreign satellite thus would only be required to show that the ECO-Sat test is met for the relevant category of satellite service it seeks to use.

The DISCO II Notice recognizes moreover that, while the ECO-Sat test has been crafted so that it can be applied to all satellite services, MSS may raise different competitive issues. For example, the Commission states that for MSS, even though uplink facilities and/or MSS terminals

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<sup>9</sup> Id at ¶ 22.

<sup>10</sup> Id at ¶ 27. The Notice states that a “home market” ECO standard, by itself, is insufficient in two respects: (1) in some cases a country other than the ITU coordinating administration may derive benefits from U.S. market access (i.e., a foreign country with a closed market may coordinate its satellite system through an administration of convenience); and (2) satellite systems typically cover many different countries and thus an “in-or-out decision on market access for a non-U.S. system based solely on the openness of that system’s home market ... would leave open the possibility that the non-U.S. satellite, once it entered the U.S. market, might be able to serve some routes on which U.S. satellites are prevented from competing. This result would distort competition for users in the United States...” Id at ¶ 26.

<sup>11</sup> Id at ¶ 18.

are outside the U.S., an MSS system nevertheless may be accessed in the U.S. via terrestrial facilities.<sup>12</sup> In this way, it is alleged that a foreign MSS system might still offer service to the U.S. despite the fact that relevant foreign markets are closed to U.S. MSS systems. Accordingly, the Commission states that it is:

“inclined to deal with MSS market access issues through simultaneous evaluation of effective competitive opportunities for MSS providers on a global or regional basis. Under such an approach, we would require that some ‘critical mass’ of foreign markets be open to U.S. satellite operators before a non-U.S. MSS system could provide any service in the United States.”<sup>13</sup>

In other words, for MSS systems, the FCC’s two-pronged “home market/route market” test would be modified. Even if an MSS provider’s home market is open to U.S. MSS systems, the foreign MSS system could not serve the U.S. until an unspecified “critical mass” of foreign markets is open to U.S. MSS operators.

The ability of a U.S. earth station applicant to satisfy the foregoing ECO-Sat test does not necessarily mean that a foreign satellite service may be accessed. According to the DISCO II Notice “[o]nce we have applied the ECO-Sat test, we propose to examine other factors that bear on whether grant of the application is in the public interest” including “the general significance of the proposed entry to the promotion of competition in the United States and the global satellite market; issues of ... foreign policy, and trade on which we would defer to the Executive Branch;

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<sup>12</sup> The Commission provides the following example involving a global MSS system: “[A] call from an office in Ohio to a non-U.S. MSS system handset in the Himalayas could travel by land line to Asia before any radio communication takes place ... [T]hus if the ECO-Sat test applies only to earth station applications, then such a call may be completed even if the Himalayan market in question is tightly closed as a matter of law to U.S. MSS markets.” Id at ¶ 45.

<sup>13</sup> Id at ¶ 47.

and spectrum availability and coordination.”<sup>14</sup>

B. The Proposed ECO-Sat Test For MSS Does Not Reflect The Unique Technical, Commercial And Regulatory History of TMI and AMSC

The main shortcoming of the generic MSS market access test described above is its failure to distinguish between two fundamentally different MSS systems: the regional geostationary MSS systems now operated by TMI and AMSC, and the proposed global MSS systems which will use fleets of low and medium earth orbit satellites (LEOs and MEOs) to be launched beginning in 1998, at earliest. Unless a distinction is drawn between these two market segments, as the FCC has done elsewhere,<sup>15</sup> and an appropriate market access test is adopted for each MSS segment, the Commission's stated goals in this proceeding will be compromised needlessly. Conversely, by

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<sup>14</sup> *Id.* at ¶ 48. The latter issues -- spectrum availability and coordination -- deserve special attention according to the Commission: “For example, we propose to consider whether the licensing country of the non-U.S. satellite system will coordinate the spectrum for its system(s) with U.S. satellite systems ... in good faith.” *Id.* at ¶ 49. “[I]n situations where the United States and other administrations are engaged in coordination of spectrum covering the United States, we propose to consider the effect that any authorization of service would likely have on spectrum coordination efforts.” *Id.* at ¶ 51.

<sup>15</sup> Notably, just one month after the DISCO II Notice was adopted, the FCC stated: “Geostationary and nongeostationary MSS systems each have distinctive service characteristics, and we believe that each type of service should be allowed to demonstrate its advantages.” Notice of Proposed Rulemaking, IB Docket No. 96-132, released June 18, 1996, ¶ 12 (hereafter Upper and Lower L-Band Spectrum NPRM). In addition, the FCC has adopted a wholly different set of licensing and geographical service requirements for the proposed Big LEO and MEO systems. See e.g., Big LEO Report, 9 FCC Rcd, 5936 (1994), on reconsideration, 61 Fed. Reg. 9944, (March 12, 1996). These MSS systems must have the capability of providing global service. See e.g., 47 CFR Section 25.43(b)(2)(ii) requiring that such systems “be capable of providing mobile satellite service to all locations as far north as 70° latitude and as far south as 55° latitude for at least 75% of every 24 hour period ....” This FCC rule makes broad foreign market access critical to the future success of these MSS systems. AMSC has no such multi-national service obligations and, in fact, need only serve the U.S.

treating the TMI and AMSC system as sui generis and applying the simplified ECO-Sat test advanced herein, this proceeding can lay the groundwork for a competitive North American MSS market today without prejudicing the future market access rights of other existing or proposed U.S. mobile satellite operators.

Again, some background may be helpful to understand why the TMI and AMSC systems are fundamentally different from other MSS systems and, hence, why the public interest would be best served by applying a different ECO-Sat test.

#### 1. Origin of North America's MSS Systems.

Planning for North American MSS systems was initiated in the 1970s by the Canadian Department of Communications (DOC), now part of Industry Canada, and the U.S. National Aeronautics and Space Administration (NASA). Canada's plans for an MSS system were well advanced by the time the FCC took up the initial U.S. application. However, for compelling technical and economic reasons, the Canadian and U.S. MSS satellite proposals were soon twinned. The considerations which led to the joint development of the U.S. and Canadian MSS were discussed in detail by the Commission in its 1985 rulemaking notice to allocate spectrum for new U.S. mobile satellite service.<sup>16</sup>

Noting that Canada had previously developed a proposal to launch an MSS system in the UHF band (at 900 MHz) and to reallocate 30 MHz of L-band spectrum (at 1.5-1.6 GHz) for

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<sup>16</sup> See Notice of Proposed Rulemaking, Gen. Dok. No. 84-1234, 50 Fed. Reg. 8149 (February 28, 1995).

future MSS systems,<sup>17</sup> the Commission stated that “[t]he need for and desirability of cooperation between the U.S. and Canada . . . is especially pressing.”<sup>18</sup> “Canadian utilization of these UHF frequencies for its MSAT may preclude their use for terrestrial services in the U.S. (or, conversely the use for terrestrial services in the U.S. may preclude MSAT in Canada).”<sup>19</sup> By contrast “[p]aired exclusive allocation [for MSS] and interoperability would allow for mutual backup as well as for the evolution of standards of design, equipment and operation.”<sup>20</sup>

Elsewhere the Commission described the public interest benefits of a parallel Canadian system as follows:

“The Canadian MSAT proposal is significant because it offers a way to share the very substantial development costs of mobile satellite systems between Canadian and U.S. entities. This could be done through joint design and procurement, with the additional possibility of each system serving as a back-up operator to the other.”<sup>21</sup>

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<sup>17</sup> For details on these Canadian spectrum proposals, see Canada Gazette Notice, DG7P-003-84/DGTR-014-84, released May 4, 1984. See also Notice, 50 Fed. Reg. 8149, supra at ¶ 6, n. 15.

<sup>18</sup> Id. at ¶ 35, footnote omitted.

<sup>19</sup> Ibid.

<sup>20</sup> Ibid. To that end, the FCC also observed that in November 1983 the DOC and NASA had signed a Memorandum of Understanding to cooperate in “provid[ing] commercial mobile-satellite communication capability to the U.S. and Canada” in recognition “that the nature of mobile communication is such that regional frequency and orbital slot coordination/sharing is fundamental to the implementation of this new service.” Ibid.

<sup>21</sup> Id. at ¶ 6.

Four years after the 1985 rulemaking notice, when the FCC licensed the American Mobile Satellite Corporation (AMSC)<sup>22</sup> to construct a single U.S. MSS as a multi-company consortium, the FCC restated its support for a cooperative U.S.-Canada MSS system. “Throughout this proceeding,” said the Commission, “we have discussed the possibility of a regional North American or joint U.S.-Canada MSS system and have cited the potential benefits of shared development costs and back-up and restoration capability.”<sup>23</sup> Accordingly, in addition to mandating that the AMSC satellite cover the continental United States, Alaska, and Hawaii, the FCC found that the public interest also would be served by permitting AMSC to design its system to provide geographical coverage to Canada and Mexico.<sup>24</sup> The Canadian government had previously authorized TMI to construct an MSS system with a similar North American service footprint.<sup>25</sup>

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<sup>22</sup> This is the predecessor to the current licensee, AMSC Subsidiary Corporation. However, for ease of reference, both companies are referred to as AMSC in this comment.

<sup>23</sup> AMSC Authorization Order, 4 FCC Rcd 6041, 6056 (1989). Later the Commission was even more explicit about the link between Canada’s proposed MSAT system and the AMSC licensing decision: “[E]ven before AMSC’s license was granted, it was contemplated that the U.S. and Canadian systems would provide back-up capacity for each other in the event of a failure. Thus the Commission decision to grant only one MSS license was based, in part, upon the notion that ‘[a]ny arrangements for a joint U.S.-Canadian MSS system will also be facilitated by authorizing only one U.S. MSS licensee. Second Report and Order, CC Docket No. 84-1234, 2 FCC Rcd at 485 (1987) n. 17....’” AMSC License Modification Order, 8 FCC Rcd 4040, 4042, n. 30.

<sup>24</sup> AMSC Authorization Order, *supra* at 6056.

<sup>25</sup> See P.C. 1987-2256 dated November 6, 1987: Order in Council granting TMI the authority to establish and operate satellite communications for the provision of mobile communications services and provide in Canada and elsewhere services associated with mobile communications services.

2. Construction and launch of twin MSS systems by TMI and AMSC.

Following the FCC's 1989 licensing order for AMSC, TMI and AMSC sought to finalize the joint procurement arrangements which had long been under discussion. In July 1990, AMSC signed a construction contract with Hughes Aircraft Corporation. Then, in December 1990, AMSC signed a contract with TMI for the joint procurement of the AMSC and TMI satellites from Hughes and Spar Aerospace Ltd. of Canada. The AMSC and TMI satellites were designed to be substantially identical; each would operate in a mid-continent geostationary orbit;<sup>26</sup> have overlapping transponder-beams or "footprints" to provide similar coverage of the U.S. and Canada; operate on different but mutually compatible L-band frequencies; and each satellite would have analogous service capacity.<sup>27</sup>

AMSC and TMI also cooperated closely in the design, development and procurement of the Communication Ground Segment (CGS) which was jointly contracted from Westinghouse Electric Corporation in May 1992. Given that both satellites would be operating on adjacent L-band frequencies, Westinghouse was also responsible for developing a standard air interface for satellite telephony. This would allow a common terminal to be used for accessing both satellites -- i.e., mobile customers in the U.S. and Canada would be able to use the same handsets.<sup>28</sup>

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<sup>26</sup> The FCC assigned the first AMSC satellite 101° W.L. and Canada authorized the TMI satellite to operate at 106.5° W.L.

<sup>27</sup> The technical specifications of AMSC-1 are described in the American Mobile Satellite Corporation 1995 Annual Report on Form 10-K. The TMI specifications are comparable as defined in the Joint Operating Agreement dated April 15, 1990 between AMSC and TMI.

<sup>28</sup> "With respect to the development of their respective communication ground segments, AMSC and TMI jointly own patents, technical data and other intellectual property, including the final MT [Mobile Telephone] Performance Specification" for the parties' common handsets which

In addition, at the encouragement of the FCC and the Canadian government, AMSC and TMI entered into two related agreements:<sup>29</sup> (1) to share the risk of a satellite launch or in-orbit failure; (2) to share capacity initially when only one satellite is operational; and (3) to provide capacity to each other in certain other circumstances. These agreements and their potential benefits were expressly recognized by the FCC in 1993 when the Commission granted AMSC additional time to construct and launch its MSS system, in part because the cooperative development of an MSS system with Canada had taken longer than anticipated.<sup>30</sup>

The first AMSC satellite, AMSC-1, was launched in April 1995 and initiated domestic commercial voice and data services in December 1995. Pending launch of its own satellite and pursuant to the capacity sharing arrangements described above, TMI leased channels on the AMSC satellite for Canadian service, commencing in January 1996.<sup>31</sup> TMI's own MSAT-1 was subsequently launched in April 1996 and commercial service began for Canadian customers over this satellite in June 1996.

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was "developed by Westinghouse at the joint expense of the company [AMSC] and TMI." American Mobile Satellite Corporation 1995 Annual Report on Form 10-K, page 9.

<sup>29</sup> See "Joint Operating Agreement", dated April 15, 1990, and "Memorandum of Agreement For Satellite Capacity", dated February 17, 1992, both between AMSC Subsidiary Corporation and Telesat Mobile, Inc. For ease of reference, in these comments Telesat Mobile Inc. and TMI Communications and Company, Limited Partnership, which acquired the Telesat Mobile Inc. MSS interests following a reorganization, are each abbreviated as TMI.

<sup>30</sup> See AMSC License Modification, *supra*, 8 FCC Rcd at ¶s 7 and 14.

<sup>31</sup> See e.g., Order and Authorization, DA 96-578, released April 12, 1996.

C. The Regional MSS Systems Operated By TMI And AMSC Should Be Treated As A Separate MSS Market Segment And Governed By A Simplified ECO Test

The joint development, similar service areas and common communicators for the TMI and AMSC systems described above makes the generic MSS market entry test proposed in the Notice counterproductive. The goals of the proposed ECO-Sat test -- greater U.S. access to foreign satellite services and effective competitive opportunities for like U.S. services abroad -- will best be advanced by treating the current AMSC and TMI systems as a separate market segment distinct from other MSS systems, and then applying a simplified market access test.

There are several reasons why this alternative approach would be more likely to serve the goals of this proceeding.

1. Grouping the AMSC and TMI systems with global MSS systems will unnecessarily delay effective competition for North American MSS.

As discussed in Section II.A. supra, although the DISCO II Notice proposes a service-by-service application of the ECO-Sat test, only three service categories are proposed: FSS, DTH and MSS. Thus, the Notice appears to require that a U.S. earth station user seeking access to any particular foreign MSS system, such as TMI, must satisfy the ECO-Sat test for all U.S. MSS systems before the earth station can access any non-U.S. MSS system.<sup>32</sup>

TMI submits that such an across-the-board ECO-Sat test for MSS is quite inconsistent with the FCC's competitive goals for this proceeding. Consumer choice for MSS in both the U.S. and Canada would be best served by narrowing the scope of the ECO-Sat test which U.S. earth

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<sup>32</sup> See DISCO II Notice, supra at ¶ 33

station users must meet to access TMI. The test should focus solely on the opportunity of TMI's twin, AMSC-1, to provide like services in Canada; access to global MSS systems in Canada (or elsewhere) should not be an issue.

The stated reason for imposing an additional "critical mass of foreign markets" entry test for MSS systems is of little relevance to the TMI and AMSC systems. In terms of coverage area, satellite and ground terminal emission characteristics, spectrum and power efficiency, the two systems have an equivalent capability to serve but two major markets -- the U.S. and Canada. These two countries consequently form the "critical mass" for these two systems in a regional MSS operating environment.<sup>33</sup> Hence, once AMSC has access to Canada and TMI has access to the U.S., it is most unlikely that competition for either system will be distorted so long as each satellite has access to comparable spectrum. All the other markets which these two satellites may serve in the Americas via their ancillary transponder beams are of secondary economic importance. In contrast, as noted earlier, all the U.S. Big LEOs have extensive international service obligations and are likely to compete, in part, on the ability to provide connectivity worldwide.

As far as the spectrum resource is concerned, the Commission recognizes that it is at best doubtful that there is enough spectrum to operate yet another U.S. system in the L-band now addressable by the AMSC and TMI satellites.<sup>34</sup> In other words, notwithstanding the recent

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<sup>33</sup> See the technical description and joint development of these two systems described in Section II.B., supra. Beyond that, neither AMSC or TMI has any global service obligations as do the Big LEO systems. See note 15 infra. It is these global service obligations which appear to be the major impetus for the FCC's "critical mass of foreign markets" proposal.

<sup>34</sup> See e.g., Upper and Lower L-Band Spectrum Notice, supra, note 15 at ¶s 19-20.

multilateral Memorandum of Understanding signed in Mexico City in June 1996,<sup>35</sup> no other regional geostationary MSS system is likely to be licensed due to spectrum considerations. Given this restraint, AMSC and TMI will be the only near-term participants in the regional North American MSS market -- giving rise to competition which, spectrum permitting, the FCC has stated it desires.<sup>36</sup>

For the above reasons, there is no current evidence that a "route market" or "critical mass" test is necessary to ensure that AMSC (or TMI) is treated fairly.<sup>37</sup> In any event, if discrimination is alleged in the future, the FCC already has adequate tools to address it. The ECO-Sat test should not be used to micro-manage MSS market entry once the basic competitive framework has been established.

2. Incremental market liberalization also would be advanced by recognizing the TMI and AMSC systems as a distinct sub-market.

Recognizing the AMSC and TMI systems as a separate market segment also would accord with the FCC's wish "to promote fair competition in each sub-market for satellite services" and "to expand competition in the United States as soon as other countries undertake even an

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<sup>35</sup> See "FCC Hails Historic Agreement On International Satellite Coordination." FCC Public Notice, Report No. IN 96-16, June 25, 1996. See also "U.S. and Neighbors Agree To L-Band Spectrum Coordination Framework," Communications Daily, June 21, 1996, p. 5.

<sup>36</sup> Upper and Lower L-Band Spectrum Notice, *supra* at ¶ 16.

<sup>37</sup> If anything AMSC may be advantaged by the status quo. For example, the U.S. and Mexico have recently entered into a framework agreement under which satellite companies from one country will be able to compete in the other country's markets. See "Statement of FCC Chairman Reed Hundt regarding U.S.-Mexico Satellite Agreement." FCC News Release, April 30, 1996. To date, Canada has no equivalent treaty with Mexico.

incremental opening of their markets.”<sup>38</sup> The U.S. has already granted U.S. domestic satellites, including the AMSC system, authority to serve Canada in the DISCO I order.<sup>39</sup> There is no statutory ban in Canada to TMI’s provision of service to the United States. Canadian authorities also have recognized that MSS systems are designed to operate in more than one national market.<sup>40</sup> Adoption of a simplified ECO-Sat test in the U.S. thus could quickly lead to an open-skies policy for MSS between the two countries.<sup>41</sup>

The above scenario will only be feasible, however, if (a) the ECO-Sat test distinguishes between global MSS systems and the regional TMI and AMSC systems; and (b) the test is simplified by deleting any “route specific” or “critical mass” test. The AMSC and TMI satellites each have the technical ability to provide nearly equivalent service to third countries in the Americas. The scope of such services by each satellite should be resolved by the marketplace, not by the FCC.

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<sup>38</sup> DISCO II Notice at ¶ 36. “[W]e do not propose to ... divide service categories for ... MSS ... if other countries draw such distribution when allowing U.S. satellites to provide service, we may consider such distinction when satellite systems licensed by those countries seek access to the U.S. market.” Id. at ¶ 34.

<sup>39</sup> Report and Order, 11 FCC Rcd 2429 (1996) (DISCO I).

<sup>40</sup> See Canada Gazette Notice No. DGTP-001-94, released November 3, 1994, “Policy Framework for the Provision of Mobile Satellite Services Via Regional and Global Satellite Systems in the Canadian Market.”

<sup>41</sup> Notably, Industry Canada already has indicated that it will authorize a Newfoundland company, NewEast Wireless Technologies Inc., to communicate with the AMSC satellite, on a temporary basis, subject to processing the necessary earth station applications. The FCC has granted Rockwell International Corp. temporary authority to provide service to NewEast in Canada via the AMSC satellite. See File No. TAO-2554, dated March 29, 1996 granting Letter of Linda C. Sadler, Manager Regulatory Affairs, Rockwell International Corporation to FCC, dated March 15, 1996.

III. The Proposed Earth Station Licensing Procedures Should Be Consistent With The FCC's Decision Not To Require Title III Licenses For Foreign Satellites Serving The U.S.

A. Earth Station Applicants Should Be Required Only To Demonstrate That The Foreign Satellite System Meets The FCC's Technical Requirements For That Satellite Service

A key premise of the proposed DISCO II rules is that market access by foreign satellites should be controlled by imposing appropriate conditions on U.S. earth station licensees and not by licensing foreign satellites.<sup>42</sup> This policy, which TMI supports, seems to be directly contradicted, however, by the earth station application rules proposed by the FCC to implement its new policy. Specifically, paragraph 61 of the DISCO II Notice states that any "earth station applicant who wishes to access a non-U.S. satellite should demonstrate that the non-U.S. satellite meets all Commission technical, financial and legal requirements for that service." (emphasis added.)<sup>43</sup>

At a minimum, the foregoing proposal requires clarification. On its face, the proposed rule would ban almost all non-U.S. satellites from the U.S. market because these satellites do not satisfy the FCC's legal requirements. The operators of most such satellites, including MSAT-1, are majority foreign owned and hence would not be in compliance with Section 310 of the Communications Act, absent a waiver.

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<sup>42</sup> See DISCO II Notice, *supra* at ¶ 2. This policy was adopted, in part, to ensure that foreign owned satellites can provide service to the U.S. consistent with Section 310 of the Communications Act which limits foreign ownership of U.S. radio licensees. See *Id.* at ¶ 59.

<sup>43</sup> This language is also tracked in the proposed text of Section 25.137(b) of the Rules. *Id.*, Appendix B. The financial requirement, however, would not be applied to non-U.S. space stations which are "in orbit". (*Id.*), as is TMI's MSAT-1.

TMI has no objection to a rule requiring that a U.S. earth station applicant provide legal information on any non-U.S. satellite it wishes to access, provided the information is used for informational purposes only (e.g., to determine the coordinating administration). But, to the extent that the FCC's proposed earth station application rules are designed to impose a further legal market access test -- i.e., a test which goes beyond the basic ECO-Sat framework -- they are at odds with the body of the DISCO II Notice and should be revised. Foreign satellites serving the U.S. should not be required to satisfy Section 310(b) of the Communications Act or to meet any other substantive legal test; the legal qualification of the satellite's owners should be determined solely by the licensing administration.<sup>44</sup>

**B. Receive-Only Mobile Earth Terminals (ROMETs) Operating With MSS Systems Should Be Deregulated**

Given the FCC's tentative decision to regulate access to non-U.S. satellites via the U.S. earth station application process, the DISCO II Notice proposes to revisit a 1993 Commission proposal regarding the deregulation of certain FSS receive-only earth stations. In particular, the Commission states that it now "believe[s] it would be more appropriate to continue to require a license for the use of receive-only earth stations to receive signals from non-U.S. FSS satellite systems, including Intelsat."<sup>45</sup> "Unless we license the earth station that communicates with non-

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<sup>44</sup> TMI also does not object to the proposal that non-U.S. satellites comply with the technical rules imposed on U.S. satellites furnishing equivalent services to the U.S., provided that the requirements are not used to erect a de facto entry barrier and that the rules are waived in appropriate cases (e.g., where application of the rules would unfairly discriminate against a non-conforming foreign satellite)

<sup>45</sup> DISCO II Notice, supra at ¶ 77.

U.S. satellites,” the Commission continues, “we will have no way to ensure that these radio communications ... are consistent with U.S. policy concerning competition and spectrum management.”<sup>46</sup> To implement this new policy, the FCC proposes to revise Section 25.131(j) of the Rules to read as follows:

“Receive-only earth stations operating with non-U.S.-licensed space stations shall file an FCC Form 493 requesting a license or modification to operate such station.”<sup>47</sup>

In contrast to the body of the DISCO II Notice, the text of the proposed rule appears to sweep all receive-only earth stations into the agency’s new licensing policy -- i.e., it does not distinguish between FSS and MSS receive-only earth stations. Yet, there is no record support here or in the related 1993 rulemaking docket<sup>48</sup> for such a blanket change in the status quo. Proposed Section 25.131(j), as drafted, is plainly over-broad. Whatever the merits of the FCC’s reasons for reregulating FSS receive-only earth stations, they do not apply to MSS receive-only mobile earth terminals (ROMETs).

First, the agency’s market entry policy for non-U.S. MSS systems would not be compromised by deregulating ROMETs because any one-way services provided to such terminals would be wholly incidental to the core business of an MSS system. The economic raison d’etre

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<sup>46</sup> Ibid.

<sup>47</sup> DISCO II Notice, supra, Appendix B.

<sup>48</sup> See Notice of Proposed Rulemaking, 8 FCC Rcd 1720 (1993). To the contrary, the FCC’s 1993 Notice proposed to deregulate all FSS receive-only stations “whether these stations are used at fixed locations or used in motion on aircraft or any other transportable platform.” Id. at 1723. Emphasis added. Moreover, because mobile FSS terminals have no fixed location, the agency also proposed to forego voluntary registration for such terminals. Id., ¶ 15, n. 2.

of the TMI and AMSC systems, as well as other global MSS systems now under development, is two-way satellite voice service. The FCC's competition policy will be preserved so long as the ECO-Sat test bars a U.S. fixed earth station or MET from uplinking communication to a foreign MSS system until a like U.S. MSS system can provide such services in the foreign satellite's home market.

Second, there are no significant spectrum issues related to deregulating MSS ROMETs, at least so far as North American MSS systems are concerned. As discussed above, the L-band spectrum for these MSS systems must be internationally coordinated and, once this is accomplished, the coordinated frequencies may be used throughout the relevant service area (e.g., Canada and the U.S.). In any event, as the FCC has acknowledged, the potential for harmful interference is not a factor with receive-only earth stations for MSS or FSS systems;<sup>49</sup> the Commission's earlier concerns regarding the deregulation of non-U.S. FSS receive-only terminals related to legal (treaty obligations) not technical considerations.<sup>50</sup>

Third, licensing ROMETs would discriminate against like messaging services which are delivered via satellite as compared to terrestrial transmitters. One-way (i.e., receive only) terminals for paging and similar message services are not licensed by the Commission. Such terminals are treated like Customer Premise Equipment (CPE) and may be freely distributed and used, provided the terminals meet the FCC's type certification requirements. This is so even

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<sup>49</sup> See e.g., Equatorial Communication, RM No. 4845, FCC 86-214, released May 19, 1986 at ¶s 16-17. Receive-only earth stations are "passive device[s]" and "do not raise the regulatory concerns that [Title III] licensing was intended to control", i.e., the conservation of spectrum and the prevention of harmful interference

<sup>50</sup> See Notice of Proposed Rulemaking, *supra*, 8 FCC Rcd at 1721.

though the terminals may be used to receive messages from non-U.S. sources (e.g., as is the case today for terrestrial facilities to a local U.S. paging transmitter). There is no public interest rationale for imposing a greater regulatory burden on the manufacturers, users or distributors of ROMETs.

Finally, absent any competitive or spectrum rationale for regulating ROMETs, forbearance is clearly required under Section 401 of the Telecommunications Act of 1996.<sup>51</sup> Under this new provision of the Communications Act, “the Commission shall forbear from applying any regulation or any provision of this Act” to a telecommunications carrier or service if the Commission finds that enforcement of the provision is (a) unnecessary to ensure that rates are just and reasonable and not unreasonably discriminatory; (b) unnecessary to protect consumers; and (c) is otherwise consistent with the public interest. These conditions are all satisfied here. The FCC has previously foreborne tariffs for national data messaging and paging services,<sup>52</sup> and past FCC actions (e.g., creating several nationwide 900 MHZ messaging channels)<sup>53</sup> have already given consumers a wide choice of one-way messaging services. In these circumstances,

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<sup>51</sup> This section adopted a new Section 10 to the Communications Act of 1934 to be codified as 47 U.S.C. § 160 (1996). See Pub. L. 104-104, 1105 Stat. 56 (1996).

<sup>52</sup> Detariffing of most one-way and two-way messaging services was mandated by amended Section 332 to the Communications Act, enacted by Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, § 6002(b), 107 Stat. 312, 392 (1993).

<sup>53</sup> An initial group of nationwide paging channels was allocated in 1983. See Nationwide Paging Service, 93 FCC 2d 908 (1983), on reconsideration, Third Report and Order, 97 FCC 2d 900 (1984). At that time, the FCC also forebore rate regulation of all nationwide channels. In 1993, the FCC authorized private paging carriers to obtain nationwide exclusively on additional channels. See Report and Order, PR Docket No. 93-35, 8 FCC Rcd 8318 (1993), on reconsideration, Memorandum Opinion & Order, FCC 96-53, released February 13, 1996.